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SUPREME COURT OF THE UNITED STATES *pg 24*

OCTOBER TERM, 1948

No. 331

ERNEST WOODMANSHEE

Petitioner,

vs.

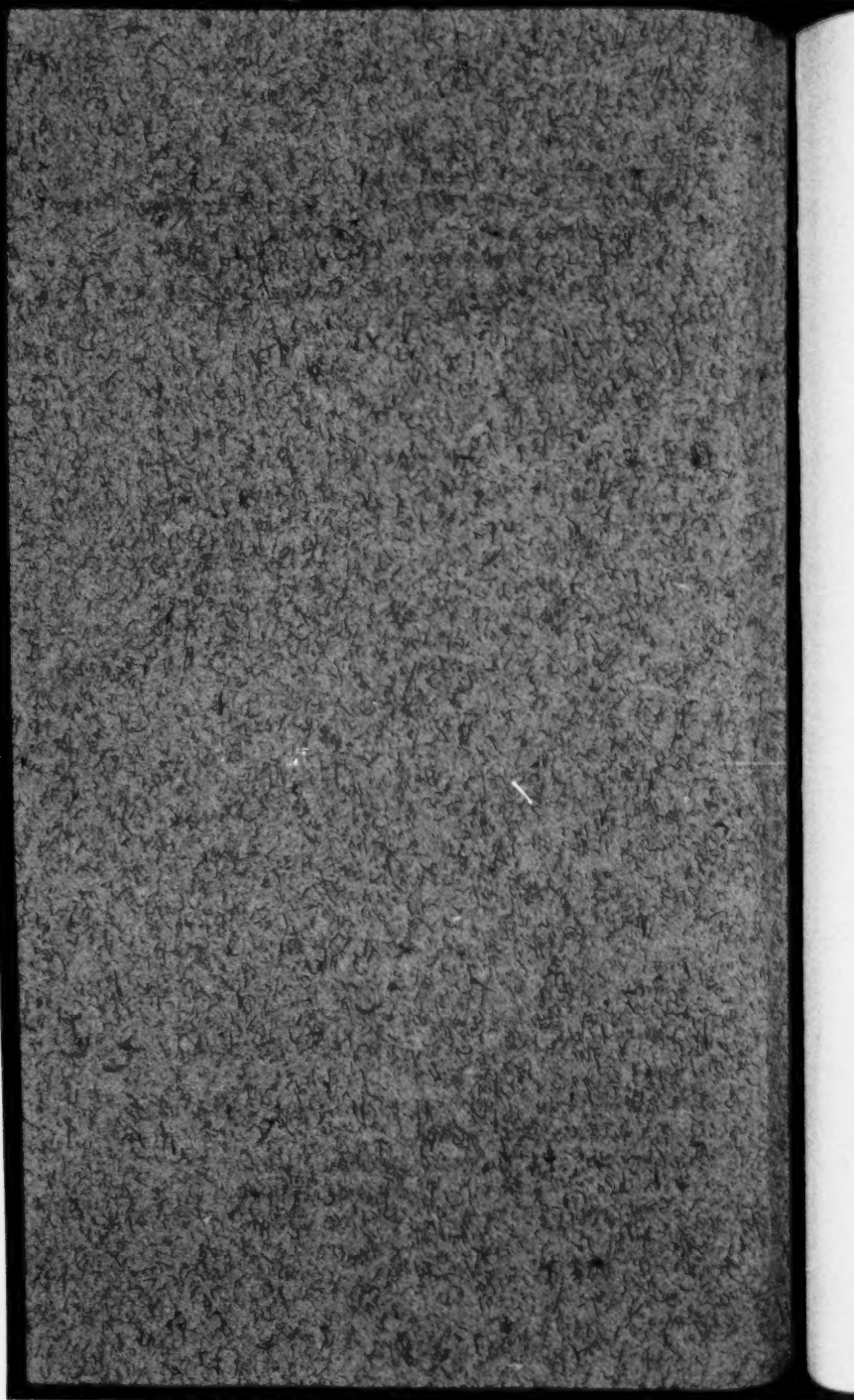
THE STATE OF CALIFORNIA,

Respondent

PETITION FOR WRIT OF HABEAS CORPUS TO THE
SUPREME COURT OF THE STATE OF CALIFOR-
NIA

✓
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 331

ERNEST WOODMANSEE,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CALIFOR-
NIA.**

To the Honorable, the Supreme Court of the United States:

The petition of Ernest Woodmansee respectfully shows:

I

Summary and Statement of Matter Involved

(1) That the following is a summary of this cause:

That petitioner is a citizen of the United States and of the State of California. That on the 25th day of April, 1947, he was accused by the Grand Jury of the City and County of San Francisco, State of California, by an indictment filed

with the Superior Court of the State of California, in and for the City and County of San Francisco, of the crime of murder, after an investigation made by said Grand Jury, and evidence both oral and documentary being presented to them concerning the death of one Charles Odom on the 10th day of September, 1946.

That thereafter on the 18th day of June, 1947, the petitioner moved the Superior Court to set aside the indictment on the ground that no legal or competent evidence had been presented to the Grand Jury upon which it could find an indictment, and the indictment it did find and file with the Superior Court did not confer jurisdiction upon the Court to try the case. This motion was denied by the Court without opinion on the 26th day of June, 1947.

That thereafter, on the 9th day of August, 1947, the petitioner herein petitioned the District Court of Appeals, of the State of California, in and for the First Appellate District, Division One, Action No. 13570, for a Writ of Prohibition, to prohibit the Superior Court from trying the case; this petition was subsequently denied by the District Court without opinion on August 15, 1947. Thereafter the petitioner on August 21, 1947, moved the Superior Court for a continuance of the trial until after September 15, 1947, when the jurisdiction of the District Court of Appeals of the State of California would cease, to petition the Supreme Court of the State of California for a hearing on his application for a Writ of Prohibition, and thereby be enabled to pursue his remedies to the fullest extent. This motion was denied, and the date of the trial set for September 2, 1947. Thereupon the petitioner petitioned the District Court of Appeals of the State of California, First Appellate District, Division One, Action No. 13584, on the 22nd day of August, 1947, for a Writ of Supersedeas to be directed to the Superior Court, staying and restraining that Court from proceeding with the trial until such time as the petitioner could

petition the Supreme Court of the State of California for a hearing on the application for a Writ of Prohibition. This petition was denied without opinion on August 27, 1947. The petitioner was forced to trial on September 2, 1947, without having had an opportunity to be heard by the Court of last resort of the State of California.

After a verdict of guilty and judgment of conviction the petitioner was sentenced to life imprisonment. From this judgment the petitioner appealed to the Supreme Court of the State of California, and that Court in a five to two decision, filed the 15th day of June, 1948, affirmed the judgment of the Superior Court.

(2) That the following is a statement of the matter involved in this application:

The matter herein involved is whether the Superior Court of the State of California, in and for the City and County of San Francisco, had jurisdiction to try the cause upon a Grand Jury indictment when no legal evidence had been presented to the Grand Jury within the meaning of Sections 919, 921 and 995 of the Penal Code of the State of California.

The evidence in the case summarized is that Thomas Foakes, an escaped juvenile delinquent, and the petitioner's codefendant, Trujillo, in the presence of the petitioner, made alleged incriminating accusations in a conversation that took place more than forty-eight hours before the murder of Charles Odom. This conversation was entirely between Foakes and Trujillo; Woodmansee did not participate in it whatsoever. "He just sat there." Foakes asked Trujillo, "If he could make some money, and if he had a job lined up?" Foakes testified that he meant a burglary, but there is nothing to indicate that the petitioner knew that it was a burglary job, or any other kind of a job, or that he heard the conversation, understood it, or reacted in any fashion whatsoever. "He just sat there." Nothing was

mentioned about burglary by any one, even Foakes. Trujillo replied that he had "nothing lined up that night but tomorrow night he would have something lined up."

The only other testimony even remotely referring to the petitioner is with reference to a certain sledge hammer, having the letters E. W. on the head thereof, the same as those of the petitioner, which was found at the scene of the crime. This hammer was never any part of the evidence produced before the Grand Jury, connected up with the petitioner in any manner whatsoever. It was not shown to be his property, it was never shown to be in his possession, it was not identified or connected with him by any witness, or by any circumstance whatsoever.

II

Statement Concerning Jurisdiction

That the jurisdiction of this Court is invoked under the provisions of Section 1, of Amendment XIV, Constitution of the United States, providing that no state shall deprive any person of life, liberty or property without due process of law; Section 237 Judicial Code, (28 U. S. C. A. 344).

That the validity of the following state constitutional provisions and statutes are involved:

Section 13, Article I, Constitution of California, providing, in part, that no person shall be deprived of life, liberty, or property without due process of law.

Section 919 Penal Code of California, providing as follows, in the investigation of the charge the Grand Jury can receive no other evidence than such as given by witnesses produced and sworn before them, or furnished by legal documentary evidence, or the deposition of a witness, in the case mentioned in the third subdivision of Section 686. The Grand Jury can receive none but legal evidence, and

the best evidence in degree, to the exclusion of hearsay or secondary evidence.

Section 921, Penal Code of California. The Grand Jury ought to find an indictment when all the evidence before them, taken together, if unexplained, or uncontradicted, would, in their judgment, warrant a conviction by a trial jury.

Section 995 of the Penal Code of California. The indictment or information must be set aside by the Court in which defendant is arraigned, upon his motion, in either of the following causes;

If it be indictment:

(1) Where it is not found, endorsed and presented as prescribed in this code.

If it be an information;

(2) That the defendant had been committed without reasonable or proper cause.

Section 1954, Code of Civil Procedure of California. Whenever an object cognizable by the senses has such a relation to the fact in dispute as to offer reasonable grounds of belief respecting it, or make an item in the sum of the evidence, such object may be exhibited to the jury, or its existence, situation and character may be proved by witnesses. The admission of such evidence must be regulated by the sound discretion of the Court.

Section 1870, Subdivision 3, Code of Civil Procedure of California: Evidence may be given upon a trial of the following facts:

(3) An act or declaration of another in the presence and within the observation of a party, and his conduct in relation thereto.

It is contended that the questions involved are substantial to be first impression in this Court and in the Supreme

Court of California, and concerning, as is submitted, the rights of citizens of the State of California, and residents of the United States of America in general, to due process of law at all stages of criminal proceedings in which they, or any of them, may be accused of crime; that the decision and judgment of this Court is required to obtain and maintain uniformity in the law as respects important public questions, the decision of the Court whose judgment is sought to be reviewed need be consonant with established rules of decision in the State of California, and in other states of the Union.

That the Federal questions sought to be reviewed were raised in the various Courts heretofore considering this cause, as follows:

(a) In the Superior Court of the State of California, in and for the City and County of San Francisco, by oral motion and argument thereof, a motion to set aside the indictment being denied by the Court without opinion.

(b) In the District Court of Appeal of the State of California, in and for the First Appellate District, by a Petition for a Writ of Prohibition to prohibit the Superior Court of the State of California from proceeding with the trial of the cause, on the ground that jurisdiction had not been conferred upon the Superior Court. This petition was denied without opinion.

(c) In the District Court of Appeal, First Appellate District, by Petition for a Writ of Supersedeas, to stay the proceedings in the Superior Court until such time as the petitioner would have to petition the Supreme Court of the State of California for a hearing on his application for a Writ of Prohibition, that being the Court of last resort.

(d) In the Supreme Court of the State of California, on appeal from the judgment of the Superior Court, an order

denying petitioner's motion for a new trial, set forth in the appeal therein and a memorandum of points and authorities in support thereof. That said Supreme Court affirmed the judgment of the Superior Court in a five to two decision, the dissenting opinion of which sustains the contentions herein advanced.

III

Question Presented on This Application

Is whether or not the requirements of due process of law within the provisions of the 14th Amendment to the Constitution of the United States are met by the indictment of an accused where the only evidence presented to the Grand Jury was incompetent and hearsay, and where the hammer found at the scene of the crime bore the same initials as the accused, but was not connected with him in any fashion whatsoever, where the Statutes of California provide that the Grand Jury can receive only due legal evidence, and the best in degree, to the exclusion of hearsay and secondary evidence.

IV

Reason Relied on for the Allowance of the Writ

(a) That the decision of the Supreme Court of California authorizing the trial of an accused upon an indictment based upon hearsay and incompetent evidence, constitutes a deprivation of petitioner's right to due process of law, in that, pursuant thereto, he may be deprived of his liberty upon testimony which under the Constitution, Statutes and established rules of decision in California and elsewhere in the Union cannot constitute proof sufficient to cause any one fact to appear in a judicial proceeding, and amounts to an authorization for the imprisonment of peti-

tioner, and all other citizens accused of crime in California, without evidence to sustain an indictment.

(b) That a review of the decision of this Court is necessary to the determining of question of great public import concerning the liberty of every person, to insure that the right of such liberty be not infringed by any judicial criminal proceeding ostensibly valid, but actually void for lack of evidence.

(c) That the questions here presented have not been decided by this Court, nor by the Supreme Court of California, and are therefore of first impression herein and therein, and that a decision of this Court is required to furnish a rule of decision general and uniform in its application.

WHEREFORE Petitioner prays that a Writ of Certiorari out of and under the seal of this Court be issued herein, to review the judgment of the Supreme Court of California in said cause.

Dated San Francisco, California, August 27th, 1948.

THOS. J. RIORDAN,
Counsel for Petitioner.

JOS. G. GALLAGHER,
Of Counsel.

Certificate of Counsel

I hereby certify that I am one of Counsel for the petitioner in the above entitled cause and that, in my judgment, the foregoing petition is well valid, and not interposed for delay.

Dated San Francisco, California, August 27th, 1948.

THOS. J. RIORDAN,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 331

ERNEST WOODMANSEE,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME COURT OF THE
STATE OF CALIFORNIA.**

I

The Petitioner was convicted of the crime of murder in the Superior Court of the State of California, in and for the City and County of San Francisco, on the 20th day of September, 1947. Said judgment of the Superior Court was affirmed by the Supreme Court of the State of California on the 15th day of June, 1948 (32 A. C. 126). The order of the Supreme Court of the State of California denying a rehearing of the opinion was filed June 30, 1948.

II

Introduction

In appraising the presentation of the points of petitioner upon this application counsel desire to respectfully request the Court's attention to the following considerations:

First, this cause is one of first impression. We have carefully examined the reports of the Courts and the various States in an endeavor to ascertain what rules should be applied to the situation as disclosed by the record. In so searching the cause, we have observed that this Court has never decided the question here involved, as applied to the factual situation in question, and that resort must be had to a consideration of general principles added and by a consideration of decisions of the States.

Second, the decision of the Supreme Court of California, sought to be reviewed, is by a divided Court, the Chief Justice and four of the Associate Justices concurring in the majority opinion, while two of the Justices dissented.

Third, the only question presented in this petition is the validity of the indictment upon which the petitioner was tried and whether the Superior Court of the State of California, in and for the City and County of San Francisco, had jurisdiction to try the cause.

III

Jurisdiction

The jurisdiction of the Court is invoked under Provisions of 237 Judicial Code, upon the following grounds:

1. The Court whose judgment is sought to be reviewed is the Court of last resort of the State of California;

2. The judgment sought to be reviewed is final, the opinion having been filed more than thirty days prior to the

filing of the annexed petition. (Rule 24A, Rules the appeal for the Supreme Court and District Courts of appeal of the State of California, July 1, 1943.) A remittur has been issued. (Rule 25A, Rules appeal for the Supreme Court and the District Courts of appeal for the State of California, July 1, 1943.)

3. A substantial Federal question is involved, to-wit, as to whether or not the requirements of due process of law, within the provisions of the Fourteenth Amendment to the Constitution of the United States are met by the indictment of the petitioner for felony after investigation by the Grand Jury, at which the only evidence presented was hearsay. The Statutes of California provide that a Grand Jury shall receive "none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence", 919 Penal Code of California. This question, as we have pointed out before, is apparently a first impression in the Court, therefore no authorities as to the appropriateness of the exercise of this Court's jurisdiction in the particular case can be supplied.

4. The question is material, the Federal question having been directly decided by the Supreme Court of the State of California, both in the majority and the minority opinions therein.

It is, therefore, submitted that the review prayed is within the jurisdiction of this Court.

Chesebro v. Los Angeles Flood Control District, 306 U. S. 459.

IV

Statement of Facts

The defendant Woodmansee was indicted with Joseph Trujillo by the Grand Jury on April 25, 1947, for the mur-

der of Charles Odom on Tuesday morning September 10, 1946.

A perusal of the testimony before the Grand Jury will reveal that the only incriminating accusations against the defendant Woodmansee are contained in a conversation between Thomas Foakes, an escaped juvenile delinquent, and the co-defendant Trujillo, in the presence of Woodmansee, that took place more than forty-eight hours before the murder of Charles Odom. (Tr. p. 17, l. 22, to p. 19, l. 2.) This conversation was entirely between Foakes and Trujillo. Woodmansee did not participate in it whatsoever. "He just sat there." (Tr., p. 19, l. 2.) Foakes asked Trujillo, "If he could make some money and if he had a job lined up." (Tr., p. 18, l. 14.) Foakes testified that he meant a burglary, but there is nothing to indicate that Woodmansee knew that it was a burglary job, or any other kind of a job, or that he heard the conversation, understood it, or reacted in any fashion whatsoever. "He just sat there." Nothing was mentioned about burglary by any one, even Foakes. He was questioned as to what he meant by "job":

"Q. What do you mean?

A. Burglary."

Trujillo replied that he had "nothing lined up that night, but tomorrow night he would have something lined up." (Tr., p. 18, l. 16.)

"Q. Did he say what he had lined up for?

A. He didn't say it was for burglary or what it was. He said he had it lined up."

Q. Did Joe Trujillo say he and Ernie had the job lined up?

A. He said he and Ernie would probably go on the job together." (Tr., p. 18, l. 21, 25, 26.)

Q. Did Ernie say anything?

A. No. He just sat there."

The only other testimony even remotely referring to the petitioner is with reference to a certain sledge hammer, "Exhibit 12", which was found at the scene of the crime. Inspector Heeg of the San Francisco Police Department testified that on Tuesday morning, Sept. 10, 1946, at approximately 5:30 he was called to 315 Sanchez Street, San Francisco:

"Mr. Elkington:

Q. I show you a sledge hammer, Inspector, and I will ask you if you have ever seen this before?

A. Yes, this is the sledge hammer that was found on the scene of the crime.

Q. Do you find any markings of any kind on the sledge hammer?

A. Yes. The initials "E.W." on one face of the sledge hammer and possibly a "W" with—

Q. (Interrupting) Indecipherable first letter?

A. Indecipherable. It may be "E" or "F"—it is hard to tell what the first letter would be.

Q. Were the markings "E W" on this hammer—on the hammer when you found it at the scene of the shooting?

A. That is right." (Tr., p. 8, l. 8 to 20.)

The foregoing is the only testimony incriminating the defendant Woodmansee on the charge pending before this Court. This testimony is not evidence, it was hearsay and, therefore, incompetent and not binding on the defendant Woodmansee.

THE GRAND JURY IN FINDING A TRUE BILL UPON THIS TESTIMONY EXCEEDED ITS JURISDICTION, AND THE INDICTMENT FOUND IS VOID AND OF NO EFFECT, AND THE SUPERIOR COURT DID NOT HAVE JURISDICTION TO TRY THE CHARGE CONTAINED THEREIN.

"Judicial evidence is the means sanctioned by law of ascertaining in a judicial proceeding the truth respecting a question of fact." 1823 C.C.P.

"The Grand Jury can receive none by legal evidence and the best evidence in degree, to the exclusion of hearsay or secondary evidence." 919 P.C.

"The Grand Jury ought to find an indictment when the evidence before them, taken together, if unexplained or uncontradicted, would in their judgment, warrant a conviction by the trial jury." 921 P.C.

"A Grand Jury which indicts a person when no evidence has been presented to connect him with the commission of the crime charged exceeds the authority conferred upon it by the Constitution and laws of the State of California . . . such an indictment is void and confers no jurisdiction upon a Court to try a person for the offense charged."

Greenberg v. Superior Court, 19 Cal. 2nd 319;
Fricke, Cal. Crim. Proc. 124, 59 A.L.R. 567.

"By the use of the phrase 'some evidence' the Supreme Court could not have meant 'any evidence', whether incompetent, irrelevant or otherwise. We take it to mean valid evidence, not evidence of no probative value but evidence such as that referred to in Section 921 of the Penal Code which, if unexplained or uncontradicted would in the mind of the members of the Grand Jury warrant a conviction by a trial jury.

While the Supreme Court in the Greenberg case did not explain whether it thought the same rule should apply in the case of an indictment as in the case of an information it at least indicated no severer rule should apply. (*Davis v. Superior Court*, 78 Cal. App. 2nd 25, — (177 P. 2d 314). Certainly then, to apply a comparable rule would not be to apply a severer rule.

Therefore, since an information which is based entirely on hearsay or incompetent evidence is unauthorized (*In re Martinez*, 36 Cal. App. 2d 687, 98 P. 2d 528; see also 7 Cal. Jur. 120, p. 984) and since there is no reason why any greater solemnity should attach to an indictment obtained under the same circumstances it necessarily follows that the indictment herein against

Dong Haw was unauthorized and in excess of the jurisdiction of the grand jury.

While one may waive a rule of evidence by failure to invoke timely objection and while improper evidence thus introduced may be considered and given whatever probative value it may have as if it in law were admissible (In re Plummer, 279 Cal. App. 2d —, —(180 P. 2d 771), and cases therein cited), it would seem to pervert that rule if our courts were to hold that in the case of a void indictment an accused, who had no opportunity to either object or to move to strike the incompetent evidence and be foreclosed forever from attacking the indictment. Apropos of this situation the words of the Supreme Court in the case of *Greenberg v. Superior Court*, supra, at page 323, are particularly pertinent:

'Petitioner cannot appeal either from the order denying his motion to quash the indictment or from the overruling of his demurrer. He could not be required to stand trial and to appeal from a possible adverse judgment without being subjected to unreasonable expense, inconvenience, and delay. ((*Bruner v. Superior Court*, 92 Cal. 239 (28 P. 341); *Terrill v. Superior Court*, 6 Cal. Unrep. 398 (60 P. 38); *Evins v. Willis*, 22 Okla. 310 (97 P. 1047, 18 Ann. Cas. 258, 19 L.R.A. (NS) 1050); see *Farraher v. Superior Court*, 45 Cal. App. 4 (187 P. 72).) The only adequate remedy he may seek, therefore, is a writ of prohibition (*Ibid*). Regardless of the fact that the grand jury is a judicial tribunal from whose decisions there is no appeal (In re Kennedy, supra), defendant has the statutory right to restrain the court by prohibition from proceeding in excess of its jurisdiction to try an offense based on a void indictment.' "

* * * In other words, the prosecution, through the agency of what may be likened to an ex parte proceeding, obtained an indictment upon evidence which, if introduced at a preliminary proceeding, would not be sufficient to hold a defendant to answer (*People v. Martinez*, supra), and thereby accomplished indirectly that

which it would have been precluded from doing directly in a preliminary hearing where a defendant would have the right to appear with counsel and object to that which he believed to be improper.

The action of the grand jury in thus returning an indictment against petitioner Dong Haw at the request or suggestion of the district attorney makes applicable the observation of the Supreme Court in the Greenberg case, that a grand jury 'is no Star Chamber tribunal empowered to return arbitrary indictments unsupported by any evidence.' "

Dong Haw v. Superior Court, 81 Cal. App. 2nd 153.

THE SLEDGE HAMMER "EXHIBIT 12" IS INADMISSIBLE AGAINST THE PETITIONER BECAUSE IT IS NOT CONNECTED WITH HIM IN ANY FASHION WHATSOEVER.

The only theory upon which the hammer found at the scene of the crime could be introduced in the investigation before the Grand Jury would be under Section 1954 of the California Code of Civil Procedure:

"Whenever an object, cognizable by the senses has such a relation to the fact in dispute as to offer reasonable grounds of belief respecting it, or to make an item in the sum of the evidence, such object may be exhibited to the jury, or its existence, situation, and character may be proved by witnesses. The admission of such evidence must be regulated by the sound discretion of the Court."

In the present instance all we have is a hammer found at the scene of the crime, with the initials E.W. on the side. Investigating police knew nothing of its existence until that morning. No one else, so far as the transcript is concerned, knew of its existence, or to whom it belonged. Foakes in his testimony did not identify the sledge hammer; Dorothy Corder in her testimony specifically stated that she had never seen either the hammer or the screw driver before. (Tr., p. 29, l. 19 to 21.)

Introduction of such evidence is specifically denounced in the case of *People v. Muhly*, 11 Cal. App. 129. In that case shoes, overall clothing, one prescription and keys found on the premises where the killing occurred were admitted by the trial court. The Court stated:

"In our opinion the foregoing objects should not have been admitted in evidence as the connection of defendant therewith was not sufficiently shown, and there was too much scope of prejudicial surmise in view of the well known fact that 'there is a general tendency when a corporeal object is produced as proof of something to assume on sight of the object all else that is asserted about it.' "

The Court in the same case quoted with approval from *People v. Hill*, 123 Cal. 574:

"A certain stick was found by a witness about an hour after the affray, about an hour after the fight took place, and it appears that the deceased was killed by being struck in the head with a stick . . . The Superior Court declared, 'The Court also erred in permitting the club with McClure found in the corral to be received in evidence and exhibited to the Jury. There was no evidence identifying the stick as the one with which the defendant struck the deceased, or in any way connecting the defendant with it. But as it is evident from the description of the physician that the blow could have been produced by any other large, smooth instrument, it was necessary that there should be some evidence identifying the stick as the one with which the blow was given before it could be offered in evidence. Otherwise the Jury could only conjecture that it had been used by the defendant.' (See Taylor on Evidence, Sec. 557.)"

In the present instance the case is even far stronger. The only thing with which the Grand Jury could conjecture as to any connection between the sledge hammer and the

petitioner was the fact that there were the initials of E. W. on the head, but this was not binding on the petitioner nor admissible in evidence against him. It is true that:

“Physical objects which constitute a part of the transaction, or which serve to unfold it, may be admitted in evidence *if properly identified* whenever the transaction is under judicial investigation.”

People v. Bannon, 22 Cal. App. 50.

But such object must be traceable to the accused. E. W. could stand for Ernest Woodmansee, but by the same token it could stand for any other innumerable combination of names the initials of which would be E. W. It was held, and very properly so, that:

“Shoes and overall cloth, and handkerchief and keys, found on the premises where the killing occurred, are inadmissible in evidence where they are not traceable to the possession of the accused.”

People v. Muhley, 11 Cal. App. 129.

“A club found in the vicinity where the homicide was committed shortly after the killing is inadmissible, where there is no evidence to identify it as the one with which the defendant struck the deceased.”

People v. Hill, 123 Cal. 571.

The reason for the foregoing decision is sufficiently stated in *People v. Muhley*, 11 Cal. App. 136:

“The foregoing objects should not have been admitted in evidence, as connection of the defendant therewith was not sufficiently shown, and there was too much scope for prejudicial surmise, in view of the well known fact that “there is a general mental tendency when a corporeal object is produced as proof of something, to assume on sight of the object all else that is asserted about it.” ”

Never was the foregoing reason more aptly demonstrated than in this case. It was apparent on its face and from the very physical conditions surrounding the killing that there was more than one actual participant. Foakes knew he was involved—he knew he would eventually be brought in—he knew that Trujillo was suspected—he knew that the tools were Trujillo's—he knew that Ernest Woodmansee was associated with Trujillo in other escapades, then when the hammer was produced with the initials E. W. what better out did he have than to accuse Woodmansee? His testimony as to the methods and suggestions used by the police to establish this theory, is more eloquent than argument. When Foakes was interviewed by Inspectors Heeg and Lee at Lancaster, in February or March, 1947:

Q. Did they show you Peoples Exhibit No. 7?

A. Yes.

Q. What did you say with reference to that?

A. I couldn't identify that.

Q. You couldn't identify that whatsoever?

A. No.

Q. Did they show you any initials, or call your attention to any initials on this hammer?

A. Uh-huh.

Q. Was that the first time you had ever seen this hammer?

A. Yes sir.

Q. And what initials did they draw your attention to on this? *Put it under the light there, you can see it better, under the reporter's light.*

Q. Was it on the handle, or on the head?

A. I don't remember. They pointed out some initials to me, I remember tha-

Q. Do you know what the initials were?

A. I think *they were supposed to have been meant for Ernest Woodmansee*, or something like that—E. W.

Q. E. W.

A. I can't find them, but that is what I heard.

Q. That is what they told you, that they were initials of E. W. on that hammer, and pointed them out to you, and asked if this was Ernie Woodmansee's hammer?

A. They asked me if it could have been.

Q. I show you some markings here on the face of the hammer, that are apparently punched in—did they point these out to you?

A. I think so, they told me it was some initials.

Q. Did they point out those initials on the other side?

A. I don't know if they were them. They pointed out some initials.

Q. In any event you could not identify that as Woodmansee's hammer, or have seen that in Woodmansee's possession at any time, or any of the tools which you identified?

A. Not in Woodmansee's possession (Tr. 609, l. 2 to p. 610, l. 8).

THE TESTIMONY OF FOAKES IS HEARSAY, THEREFORE INCOMPETENT, INADMISSIBLE IN EVIDENCE, AND NOT BINDING UPON THE PETITIONER WOODMANSEE.

The only possible theory upon which the testimony of Foakes with regard to Woodmansee could be given is set forth in 1870 Sup. 3, C. C. P.

"An act or declaration of another in the presence and within the observation of a party, and his conduct in relation thereto."

But this rule of evidence is subject to numerous exceptions and qualifications.

"It is undoubtedly the California rule that statements of third persons are not admissible in evidence simply because they were made in the presence and hearing of the accused."

8 Cal. Jur. p. 101, N. 3 and cases cited thereunder.

"It is only when there is something in the conduct of the accused in response thereto that is material to the issue that they are admissible at all and they are

admissible then solely for the purpose of explaining his conduct."

(N. 4 above)

"In other words, it is only the conduct of the accused that is evidence in such cases."

(N. 5 above)

Therefore, if it is assumed that the conversation between Foakes and Trujillo is an accusatory statement with regard to Woodmansee, then it is only the conduct of Woodmansee with regard thereto that is admissible.

"Extra judicial statements of a witness are in themselves incompetent, only the contemporary response by the accused to them is material."

People v. McCoy, 127 Cal. App. 195.

"The statement * * * was clearly hearsay and could not be deemed admissible in evidence unless accompanied by proof of the conduct of the defendant indicating guilt of the offense for which he was on trial. In such cases it is the conduct of the accused that is admissible in evidence, and not the statements of the accuser * * *. Without evidence of defendant's conduct indicating guilt the statements were inadmissible."

People v. Jolley, 35 Cal. App. 2nd, 164.

"If a defendant denies the charge there can be no evidence in this of guilt and, therefore, the whole matter should be excluded, lest the jury may infer from its being admitted that they are warranted in treating it as evidence against the defendant."

People v. Lee, 55 Cal. App. 2nd, 168;

People v. Turner, 1 Cal. App. 420.

It will be argued that the silence of Woodmansee in the face of this conversation is an admission of guilt. This is not true either in fact or in law. It is assuming something

not in evidence whatsoever. It assumes that Woodmansee heard the conversation, understood that a burglary was to be perpetrated and that he was to participate in it. Foakes repeatedly stated in his testimony that the conversation was between himself and Trujillo, that Woodmansee did not participate in it—"he just sat there." Whether he heard or paid any attention to the conversation is left entirely to one's imagination. There was nothing in the conversation to put Woodmansee on notice that a criminal act was contemplated, the only thing mentioned was a "job". On what kind of a job we are left in the dark. Foakes was the only one who had put the connotation of burglary on the word "job". Burglary was not mentioned by either Trujillo or Foakes, it was what Foakes had in his mind and which he did not even state himself. How he conveyed the idea that the "job" was burglary is not shown in the testimony. How Woodmansee as a bystander in the conversation, would know that Foakes was referring to a burglary is not known. Certainly he is not accused of being a clairvoyant. Even if he did know that Foakes was referring to a burglary it would not call for a denial that he was to participate. The conversation was in reference to a thing to be done in the future, not for some past act of accomplishment. An accusation of a thing done could call for a denial on his part, but as to a future event involving risk on his part, and attributing to him the courage and recklessness to assume that risk, would have more of a tendency to flatter his ego as to how he was regarded by his companions, and rather than destroy that false illusion he would have kept silent even though participation was the farthest thing from his mind.

"Before the failure of a person to deny a statement of fact can be received as evidence of an admission of

guilt, or of consciousness of guilt, it must appear that he understands that he himself is accused of the crime."

People v. Davis, 210 Cal. 540.

"Where an accusatory statement is addressed to two defendants and one of them makes a reply it does not present a situation which would naturally call for a reply from the other defendant and as to him the conversation is purely hearsay, and the statement is not per se admissible against him simply because it was made in his presence."

People v. Shellenberger, 25 Cal. App. 2nd, 402.

The Court rule as to accusatory statements is set forth in a recent case of *People v. Spencer*, 78 Cal. App. 2nd, 705, citing the Supreme Court Decision of *People v. Simmons*, 28 Cal. 2nd 699:

"The test for admitting such a statement into evidence is not, as announced by the trial court that the accused 'had the opportunity to deny it', but 'whether the accusation has been made under circumstances calling for a reply.' * * * admissibility of evidence of this character depends upon whether the occasion and the circumstances were such as to afford the accused person an opportunity to act or speak, and whether the accusatory statement was one made upon such occasion and under circumstances that would naturally call for some action or reply. * * * The Supreme Court expresses grave concern over what is characterized as a growing tendency on the part of trial courts to indulge too broad a discretion in allowing admission of such evidence in the first instance; a failure to fully consider the question of whether the accused replied under restraint; whether the circumstances under which the accusation was made called for a reply; whether the accused understood the statement; and whether his conduct merely indicated a desire to avail himself of the rule against self-incrimination, or whether it could reasonably give rise to an inference of acquiescence or guilty consciousness."

As pointed out before, Woodmansee did not participate in the conversation, he neither affirmed nor denied it. The conversation in itself was not incriminating as to him and did not call for his reply or denial. The conversation as to him was purely hearsay, incompetent and inadmissible. The fact that the testimony of Foakes before the Grand Jury was the only so-called evidence the prosecution could produce after a six months investigation is no reason that this defendant should be put on trial for his life. What was said in *People v. Spencer*, 78 Cal. App. 2nd, p. 707, is particularly apt in this instance:

“Fundamental rules such as the one with which we are concerned were not adopted to secure immunity for the guilty but for the protection of the innocent. Whether guilty or innocent, appellant was entitled to have his case fairly tried according to the established rules of law, for as was said in *Hurd v. People*, 25 Mich. 405, ‘Though unfair means may happen to result in doing justice to the prisoner in the particular case, yet justice so attained is unjust and dangerous to the whole community.’ The doctrine that respect for the law cannot be inspired by withholding the protection of the law is one which recognizes no exceptions. It is by silent approaches and slight deviations from established legal modes of procedure that illegitimate and unconstitutional practices get their first footing. We are counseled by Mr. Justice Sutherland of the Supreme Court of the United States in a strong dissenting opinion delivered in the case of *Associated Press v. National Labor Relations Board*, 301 U. S. 103 (57 S. Ct. 650, 81 L. Ed. 593) to ‘withstand all beginnings of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time.’ The acquittal of a guilty person is truly a miscarriage of justice, but the conviction of an innocent person through relaxation of

those fundamental legal principles such as the one with which we are here concerned, would be a tragedy."

The whole question on this application is very well summarized by Fricke on California Criminal Procedure at page 124:

"Since incompetent evidence is in effect no evidence and since a defendant has had no opportunity to make any objection to the reception of evidence before a Grand Jury it follows that an indictment supported solely by incompetent evidence is the same as, and no better than, an indictment with no evidence to support it. The language of the Greenberg case that if there is some evidence to support it the courts will not inquire into its sufficiency can only refer to 'some evidence' which, regardless of other and conflicting evidence which will constitute reasonable or probable cause such as would justify a committing magistrate in holding a defendant to answer and that if the evidence before the Grand Jury does not measure up to this standard there is 'no evidence' to support the indictment, but that if the evidence shows reasonable or probable cause the courts will not weigh or inquire into the sufficiency of the evidence. Since the appellate courts may in a case where there is no evidence to support an indictment, issue a writ of prohibition to stay the action of the trial court from proceeding under the void indictment and the matter being jurisdictional, the trial court obviously has the inherent power by its own action upon proper application to accomplish the same result as could be attained by such action of the appellate court. While no remedy is provided by statute trial courts have, since the Greenberg case, permitted and ruled upon a motion in the nature of a motion to set aside an indictment where the grounds assigned came within the rule of that case."

It is respectfully submitted, therefore, that the indictment of the petitioner Woodmansee herein should have been set aside by the Superior Court; that upon its denial the

District Court should have granted the petition of appellant for a Writ of Prohibition, that upon the denial of that petition the appellant's petition for a Writ of Supersedeas should have been granted, postponing the trial of the case until such time as the appellant could have petitioned the Supreme Court for a hearing and thereby have pursued his remedies to the fullest extent; that in view of the foregoing proceedings the above entitled case should be reversed, because the indictment of the grand jury was void and did not confer jurisdiction upon the Superior Court to hear the cause.

WHEREFORE, for the reasons stated and the showing made, it is respectfully submitted that this petition for Writ of Certiorari be granted.

Dated San Francisco, California, September 27, 1948.

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